In the

Supreme Court of the United States

No. [redacted]366

OCTOBER TERM, 1922

THE STATE OF WASHINGTON,
Plaintiff in Error,

v.

W. C. DAWSON & COMPANY, a corporation,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT.

Plaintiff in error instituted this action against the defendant in error for the purpose of collecting industrial insurance premiums by virtue of section 7676, Rem. Comp. Stat., which reads, in part, as follows:

"Insomuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay-roll for that year * * *"

Then follows a schedule showing the percentage that each different industry should pay in accordance with the degree of award in such industries.

It is alleged in the complaint that the defendant in error employs workmen known as stevedores, whose work consists of stowing away the cargo in ships lying upon the waters of Puget Sound, which are navigable waters within the boundaries of the state of Washington. A demurrer was interposed to the complaint, which was sustained by the trial court. Plaintiff in error refused to plead further, and an order of dismissal was entered. An appeal was taken from this order of dismissal to the supreme court of the state of Washington, and on December 20, 1922, (Vol. 22, No. 8, p. 355, Wash. Dec.) the judgment of the lower court was affirmed. A petition for a rehearing was filed by the plaintiff in error, and granted by the supreme court of the state of Washington, and the cause was reheard *en banc* by the supreme court of the state of Washington, which resulted in the original decision of the supreme court of this case being adhered to and a judgment was entered in conformity with such opinion. This writ of error was then sued out to the supreme court of the state of Washington.

ASSIGNMENTS OF ERROR.

I.

The court erred in directing the sustaining of the demurrer of defendant in error in the supreme court of the state of Washington to the complaint.

II.

The court erred in entering judgment in said action against the plaintiff in error and dismissing its action.

III.

The court erred in holding that the plaintiff in error in the supreme court of the state of Washington had no right to collect from an employer engaged in the business of stevedoring a percentage of his pay-roll as premiums by virtue of the workmen's compensation act of the state of Washington, being sections 7673, *et seq.*, Rem. Comp. Stat.

IV.

The court erred in holding that the amendments to section 24 and section 256 of the Judicial Code, approved by Congress on June 10, 1922, was unconstitutional in that it is repugnant to and in conflict with section 2, Article III, of the Constitution of the United States of America, and therefore of no force and effect.

V.

The court erred in not reversing the judgment of the superior court of King county of the state of

Washington, and granting to plaintiff in error rights and privileges claimed therein under and by virtue of the amendments to section 24 and section 256 of the Judicial Code, approved by Congress on June 10, 1922.

ARGUMENT.

1. Section 24 and Section 256 of the Judicial Code as Amended by the Act of Congress of June 10, 1922, is Constitutional.

Prior to 1917, clause 3 of sections 24 and 256 of the Judicial Code provided as follows:

"The district courts shall have original jurisdiction as follows:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it."

In an effort to give workmen their rights under the workmen's compensation acts of the several states who were excluded therefrom only because the admiralty court had exclusive jurisdiction, sections 24 and 256 were amended by an act of October 6, 1917, ch. 97, 40 Stat. 395, by adding to the saving clause the following:

"And to claimants the rights and remedies under the workmen's compensation law of any state."

This will hereafter be referred to as the 1917 amendment.

These sections, in so far as they attempted to confer jurisdiction to rights under the workmen's compensation acts of the several states, were declared unconstitutional in the case of *Knickerbocker Ice*

Co. v. Stewart, 253 U. S. 149. See also: *Lund v. Griffiths & Sprague Stevedoring Company,* 108 Wash. 220. Another effort was made to allow stevedores the benefits of the workmen's compensation acts of the several states by Congress, which culminated in another amendment to clause 3 of sections 24 and 256 of the Judicial Code, which was passed on June 10, 1922, 42 Stat. 634, and which reads as follows:

"The district courts shall have original jurisdiction as follows:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive: of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States."

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensa-

tion law of any State, District, Territory, or possession of the United States."

This amendment will hereafter be referred to as the 1922 amendment.

The 1917 amendment was declared unconstitutional in the *Knickerbocker* case, *supra,* because it was there held that Congress had no power to delegate this authority to the state, as it would destroy the harmony and uniformity which the Constitution established in admiralty matters. This is shown by the following excerpt from the *Knickerbocker* case, *supra,* page 164:

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission,* 188 Pac. Rep. 803."

It is the position of the defendant in error that the amendment of 1922 did not in any manner correct this evil, and that in fact it unlawfully delegates power to the several states, and that for this reason

the *Knickerbocker* case, *supra,* is still authority for the position that the 1922 amendment is unconstitutional. It will be noted that the only material difference between the two amendments is that the amendment of 1922 divests the district courts of jurisdiction in cases where such injured workmen are included under the provisions of the workmen's compensation acts of the several states. The reason that heretofore states had no power to include stevedores working on ships lying in navigable waters under the provisions of their compensation acts was that the federal courts had exclusive jurisdiction of such cases. The reasoning advanced in the *Knickerbocker* case why Congress had no power to delegate this authority to the states was that it would destroy the uniformity and harmony so essential to admiralty matters. The only issue presented by this case is whether the 1922 amendment, if operative, would in fact destroy the uniformity and harmony in matters relating to admiralty jurisprudence. It is well settled that the state has the right to enact legislation relative to certain local regulations in connection with admiralty matters which do not destroy the uniformity and harmony so essential to admiralty jurisdiction.

In the case of *American Steamboat Co. v. Chace,* 16 Wall. 522, 21 Law Ed. 369, which was a suit at common law for a death in the waters of Rhode Island caused by a marine collision, it appeared that the Rhode Island statute giving a right of action at

common law was held valid notwithstanding the point made by the defense that the cause of action was maritime by nature and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal courts. A similar situation arose in the case of *Sherlock v. Alling,* 93 U. S. 99, 23 Law Ed. 819. The statute giving a cause of action for a death was attacked on the ground that it violated the commerce clause of the Federal Constitution as imposing a new burden on the commerce, but the court held that it affected commerce only indirectly and that in such matters the states could legislate as long as Congress failed to legislate on the subject.

In the case of *Cooley v. Board of Wardens of Port of Philadelphia,* 12 How. 299, 13 Law Ed. 996, a state statute relative to pilots was under consideration and it was contended that such statutes were invalid as affecting admiralty matters, which were within the exclusive jurisdiction of Congress. The court there held that the pilotage laws are among the state statutes relating to vessels which have been upheld as not in conflict with the clause of the Federal Constitution conferring on Congress the right to regulate interstate and foreign commerce. The principle that the general maritime law may be changed, modified or affected to some extent by state legislation is also recognized in the case of *So. Pac. Co. v. Jensen,* 244 U. S., 205 (216), wherein the court said:

"In view of these constitutional provisions and the Federal act it would be difficult, if not impossible,

to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute. *The Lottawanna,* 21 Wall. 558 * * *"

and cases cited.

If the 1917 amendment were operative the district courts would still have jurisdiction of admiralty matters, and the states would have power to collect premiums from employers of stevedores and would be unable to give such employers any protection by reason of the fact that the injured employee might institute an action against his employer in the district court. This evil is ~~limited~~ eliminated by the 1922 amendment inasmuch as the district courts are deprived of such jurisdiction. It will also be noted that the 1922 amendment exempts the master and members of the crew of a vessel from that portion of the statute which provides that workmen injured under admiralty jurisdiction are saved their rights under the workmen's compensation acts of the states wherein they might be injured. This provision was obviously placed therein with the *Knickerbocker* case in view as master and members of the crew are so closely connected with commerce itself, and any state legislation affecting them would undoubtedly be invalid as interfering with the harmony and uniformity so necessary to admiralty matters. But there is no logical reason why harmony and uniformity in admiralty matters should apply to stevedores, as they are not so closely

connected with commerce itself that it is necessary that laws relative to them should operate uniformly in the entire country. They do not travel with the ships from port to port, but remain constantly in the port where they are employed and to place the rules and limits relative to their rights when injured under the disposal and regulation of the several states would not destroy the uniformity and consistency which the Constitution aimed at on all subjects of a maritime character. State legislation relating to the rights of stevedores when injured is purely local in character, and would not in any sense destroy uniformity in admiralty matters, and this was no doubt the theory upon which Congress proceeded when the 1922 amendment was enacted in view of the *Knickerbocker* case, which was decided prior to that time.

In any event, it is the contention of the plaintiff in error that the rule enunciated in the *Knickerbocker* case has been modified by the recent case of *Grant Smith Porter Co. v. Rhode,* decided January 3, 1922, Volume 24, No. 26, Sup. Ct. Rep., page 157. In that case it appeared that the workman was injured while at work on a partially completed vessel lying in navigable waters in the state of Oregon. The state of Oregon had a so-called elective workmen's compensation act, and unless the employer and employee notified the department of their election not to come under the act, they were included. In the instant case no such notice was given, so they were automatically included within the provisions of the Ore-

gon act. In this case it is true that the work which the workman was engaged in at the time of the injury was not maritime in its nature, but the tort was committed on navigable waters, and in cases of tort, locality is the test whether or not admiralty has jurisdiction. *Atlantic Transportation Company v. Imbrovek*, 234 U. S. 52. In holding that the workman was entitled to the benefits of the workmen's compensation act of Oregon, the court said:

"Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer, yes.

"Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon workmen's compensation act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

The workmen's compensation act of Washington is similar to that of Oregon in so far as the exclusive features are concerned as evidenced by section 7673, Rem. Comp. Stat., which provides, in part, as follows:

"The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation * * *."

The *Rhode* case, *supra,* is authority for the position that an elective workmen's compensation act may include workmen engaged on navigable waters, and that by so doing it does not destroy the uniformity and harmony of admiralty matters.

It is contended that a compulsory act, such as the workmen's compensation act of the state of Washington, would not tend to destroy such uniformity any more than an elective act. In fact, a compulsory act would not tend to create as much confusion in admiralty matters as an elective act. The operation of the compulsory act on admiralty matters would certainly be uniform, at least throughout the state. District courts would have no jurisdiction and every workman engaged in maritime works would come within the provisions of the workmen's compensation act. Under an elective act such workmen might or might not come within the provisions of the workmen's compensation act, depending on whether or not he elected so to do, and thus create much confusion and destroy uniformity in admiralty matters.

Again, in the case of *Southern Pacific Company v. Jensen*, 244 U. S. 205, the court said:

"Construing our former opinions, it must now be accepted as settled doctrine, that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is therefore submitted, in view of the *Rhode* case, *supra*, that Congress has as much power to de-

fine the rights and liabilities of persons engaged in a maritime occupation as such persons would have a right themselves to do, and assuming that workmen and their employers have a legal right to contract as to the liability of the employer in case of accident, the practical operation of such a procedure would tend to destroy uniformity in admiralty matters to the same or a greater degree than if they were included within the provisions of a compulsory workmen's compensation act by virtue of an act of Congress.

Again, in the *Rhode* case, it was said:

"Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international of interstate relations * * *."

If the application of an elective act would not work material prejudice to any characteristic feature of the general maritime law, it is difficult to see why the operation of a compulsory act would work such material prejudice, as both acts function the same provided the election is made to come under the elective act. It will, no doubt, be claimed by the defendant in error that the doctrine of the *Rhode* case rests entirely on contract, and that in the absence of the so-called contract, the Oregon compensation act would not have applied. If the contention that the

Rhode case rests purely on contract is intended to mean that the scope and jurisdiction of the act was by contract extended to a *locus* to which, in the absence of contract, it would not have extended, then the contention is in law erroneous. This is so:

(1) Because the opinions of the United States Supreme Court in the later cases of *State Industrial Commission v. Nordenholt Corp.,* 259 U. S. 263, 66 Law Ed. —, 42 Sup. Ct. Rep. 473, and *Great Lakes Dredge & Dock Co. v. Kierejewski,* decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, page 490, make it plain that even in the absence of contract the *locus* of the injury in the *Rhode* case was within the jurisdiction of the Oregon statute;

(2) Because, assuming for the moment that the parties might voluntarily contract to come within the provisions of the workmen's compensation act, the parties under the so-called elective compensation statute do not voluntarily contract, but the statute is imposed upon them in case they within a specified time do not express their intention to stay out of the operation of the statute, and staying from under the statute is burdened with such heavy penalties that the parties are practically compelled to come within the statute, which they do by merely maintaining silence and not by contracting. In other words, the so-called elective statutes are not based on express contract, and are, in practical effect, as compulsory as the so-called compulsory statutes.

In the case of *State Industrial Commission v. Nordenholt Corp., supra,* the court makes it clear that the injury in the *Rhode* case was within the scope of the statute, apart from any question of contract. The court says:

"In *Grant Smith-Porter Ship Co. v. Rhode,* a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette river. The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workmen's activities at the time had any direct relation to navigation or commerce,—it was essentially a local matter * * *."

These words make it plain that the *locus* of the injury in the *Rhode* case on an incompleted ship in the course of construction on navigable waters was apart from any question of contract intended by the Oregon legislature to be covered by the scope of the Oregon act, which, like the Washington act, covered ship building. The court says that the statute prescribed the exclusive remedy for the injury in that case, and that the question was whether to give the statute (not the contract) effect in that *locus* "would work material prejudice to the general maritime law."

The *Nordenholt* case itself makes it clear that there is no distinction in the effect of the so-called

elective and compulsory statutes. The *Nordenholt* case arose under the New York Statute, which is a compulsory one. See *Duart v. Simmons* (Mass.) 211 N. E. 10. The court cites for support, the *Rhode* case, decided under the so-called elective statute. The court itself is conscious of no distinction between the two types of statutes. This is shown by the following language in the *Nordenholt* case:

"And this is true, whether awards under the act are made as upon implied agreements or otherwise."

The theory of the New York and Washington statutes being identical and the Supreme Court of the United States having found it perfectly proper to use the *Rhode* case in support of the *Nordenholt* case, there seems to be no strong reason why there should be a distinction of this character. Again, in the recent case of *Great Lakes Dredge & Dock Co. v. Kierejewski, supra*, in commenting upon the *Rhode* case, the court said:

"In the cause last cited, neither Rhode's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we are of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity."

Here again the court was dealing with the New York compensation act, a so-called compulsory statute, and had it so chosen, might have distinguished the *Rhode* case on the ground that it was decided under an elective statute. But the quoted language

shows that no such distinction was in the mind of the court. The *Rhode* case rests squarely on the doctrine that state legislatures may affect admiralty jurisdiction as to local matters. Such is the doctrine developed in *Western Fuel Co. v. Garcia,* 275 U. S. 233, 66 L. Ed. 210, on which the *Rhode* case is based. It is true that in the *Rhode* case the contract of employment, *viz.,* of building a ship, was not a maritime contract, and it may be maintained that for that reason *Rhode's* work did not affect commerce and was not closely allied thereto. The cause of action for an injured workman by reason of his injuries is created by reason of the tort and not by reason of the nature of the contract of employment. It is well settled that the test in determining whether admiralty jurisdiction does or does not prevail in tort matters is location. The liability of an employer for damages on account of injuries is not within admiralty jurisdiction when the accident occurs on land, even though the contract of employment be maritime in its nature, as the test as to whether admiralty courts have jurisdiction of tort actions is dependent on the location of the tort and not upon the question of whether the contract of employment is or is not maritime in its nature. The basis of an award under the workmen's compensation act or an action instituted in the federal court for injuries is one *ex delicto,* and the award is made for an injury sustained. In view of the fact that the injury is the thing compensated for, it is submitted that the question of whether the Work-

men's compensation act or admiralty prevails is still the *locus* of the injury as the benefits of the workmen's compensation act are substituted for the common law rights. This being true, in determining whether or not the application of a workmen's compensation act to persons engaged on navigable waters does or does not affect the uniformity in admiralty matters, it makes no difference whether the contract of employment is maritime, if such persons were actually employed on navigable waters. Applying the provisions of the workmen's compensation act to a workman employed on navigable waters whose contract of employment is maritime in its nature would not hamper or destroy the harmony and uniformity in admiralty matters to any greater extent than applying the provisions of such act to a workman employed on navigable waters whose contract of employment was non-maritime in its nature, as was the situation in the *Rhode* case, because the test of whether admiralty has or has not jurisdiction in an action instituted to recover damages for such injury and which is based on tort is location. In fact, in the *Rhode* case the court said that admiralty courts would have jurisdiction of such a case, but that by reason of the exclusive features of the Oregon act, he would be precluded from instituting an action in the district court. There can also be no doubt of the power of Congress to take from the district court the jurisdiction in the excepted cases, as the district courts are nowhere mentioned in the United States Constitution

and are in fact, creatures of Congress. 25 C. J., p. 960; *Wisconsin v. Duluth*, 2 Dill (U. S.) 406. In its last analysis, it is difficult to see that any power was delegated to the states by the 1922 amendment. It deprives the district court of jurisdiction in certain cases, which is in no sense a delegation of power, and saved to suitors the rights under the workmen's compensation acts of the several states, and it simply gives to suitors certain rights just the same as suitors were given rights by said states' statutes in death cases, which was upheld in the *Garcia* case, *supra*. In all fairness to the court, we desire to call its attention to the case of *Farrell v. Waterman S.S. Co.* 286 Fed. 284, which apparently is not in harmony with the argument herein advanced.

Article III, section 2, of the Constitution of the United States, provides in part as follows:

"The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. * * *"

It is not there provided expressly that there shall be uniformity in admiralty matters in widely scat-

tered portions of this country wherein different conditions prevail and different needs are required. The objection to the 1922 amendment is that it destroys such harmony where as a matter of fact there is nothing in the Constitution itself to prevent it, although the court in the *Knickerbocker* case did state that the Constitution itself adopted and established as a part of the laws of the United States approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. It would seem that if the framers of the Constitution of the United States intended that the general rules of maritime law should be embodied therein, they would in fact be so embodied in express terms. As was said by Mr. Justice Holmes in the dissenting opinion in the *Knickerbocker* case, *supra*:

"I cannot doubt that in matters with which Congress is empowered to deal, it may make different arrangements for widely different localities with perhaps widely different needs. See *U. S. v. Press Publishing Company*, 219 U. S. 1."

It seems to be well settled that where Congress legislates on admiralty subjects, such legislation is conclusive on the states, and that it was deemed by Congress that the legislation on the particular subject should be uniform throughout the states of this nation. It is also well settled that so long as Congress does not regulate the subject, but leaves the field open, such subject, even though it be maritime in its nature,

may be regulated by state legislation. It might be more satisfactory to have a uniform law relative to maritime subjects, and Congress has power to legislate and make such regulations uniform, but if it fail to do so, it is submitted that the states may, under the police power, regulate maritime subjects within the geographical boundaries of the states. This is the position taken by Mr. Justice Pitney in the dissenting opinion in the case of *Southern Pacific v. Jensen*, 244 U. S. 243, a portion of which we quote:

"In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

"Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce

was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States. *Sherlock v. Alling*, 93 U. S. 99, 103; *Second Employers' Liability Cases*, 223 U. S. 1, 54. It required an act of Congress (Act of April 22, 1908, c. 149, 35 Stat. 65) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Express Co. v. Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities, *Smith v. Alabama*, 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Telegraph Co. v. James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc.; regulating the heating of passenger cars, *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made, *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 136, 137; a like result arising from rules of law enforced in the state courts in the absence of statute, *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 488, 491; statutes prohibiting the transportation of diseased cattle in interstate

commerce, *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U. S. 613, 630, 635; *Reid v. Colorado,* 187 U. S. 137, 147, 151; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce, *Atlantic Coast Line R. R. Co. v. Mazursky,* 216 U. S. 122, even since the passage of the Carmack Amendment, *Missouri, Kansas & Texas Ry. Co. v. Harris,* 234 U. S. 412, 417, 420; statutes regulating the character of headlights used on locomotives employed in interstate commerce, *Atlantic Coast Line R. R. Co. v. Georgia,* 234 U. S. 280; *Vandalia R. R. Co. v. Public Service Commission,* 242 U. S. 255. All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters stil remain subject to the regulation of the several States. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. 584, 585, c. 3591, sec. 1) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety; *Southern Pacific Co. v. Schuyler,* 227 U. S. 601, 612.

"In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the First Congress (Act of August 7, 1789, c. 9, sec. 4, 1 Stat. 53, 54; Rev. Stats., sec. 4235), and this court, in many decisions, has sustained local regulations of that character. *Cooley v. Board of Wardens,* 12 How. 299, 320; *Steamship Co. v. Joliffe,* 2 Wall. 450, 459; *Ex parte McNiel,* 13 Wall. 236, 241; *Wilson v.*

McNamee, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195.

"It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg, Shreveport & Pacific Railroad*, 119 U. S. 280; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365; *Manigault v. Springs*, 199 U. S. 473, 478."

The workmen's compensation act of the state of Washington was enacted by virtue of the police power of the state, which brings the present case within the rule announced by the cases cited in the quotation from the dissenting opinion in the *Jensen* case, *supra*. But in this case, a stronger situation is presented than in the case where Congress simply fails to act and leaves the field open to state legislation, for here Congress has not only failed to act, but has specifically declared that federal courts shall have no jurisdiction in cases where workmen are injured in admiralty jurisdiction in states which have a workmen's compensation act. This is not a case where Congress has left the field open by failure to legislate, but a case where Congress has specifically declared by legislation that the field shall be left open to the several states.

2. The Workmen's Compensation Act of Washington Includes Stevedores.

Some contention will be made that in any event the workmen's compensation act of Washington does not include stevedores employed on ships lying in the navigable waters of this state. Section 7674, Rem. Comp. Stat., in defining extra hazardous work, includes "steamboats, tugs and ferries," and section 7676, which divides the different extra hazardous industries into classes, enumerates in Class 42 thereof:

"Class 42. Stevedoring, longshoring, wharf operation."

It will be contended that this only applies to stevedores working on ships lying on inland and non-navigable waters, but this contention is answered by section 7694, Rem. Comp. Stat., which reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in maritime works or occupations only in cases where and to the extent that the pay-roll of such workmen may and shall be clearly separable and distinguishable from the pay-roll of workmen employed under circumstances in which a liability now exists or may hereafter exist in the courts of admiralty of the United States: *Provided*, That as to workmen whose pay-roll is not so clearly separable and distinguishable, the employer shall in all cases be liable in damages for injuries to the same extent and under the same circumstances as is specified in the case of railroads in the first proviso of section 7693."

This statute includes all workmen engaged in maritime works whose pay-roll is separable and distinguishable from those workmen who have a right

of action in admiralty. If the 1922 amendment is valid, all workmen included in the prior portion of the workmen's compensation act would be under the act, as none of them would have a right of action in admiralty by virtue of the 1922 amendment and there would be no payrolls of workmen who have a right of action in admiralty to be separable and distinguishable from the workmen included by section 7694, *supra*, and they would all come under the provisions of the workmen's compensation act of the state of Washington.

To recapitulate, it is respectfully submitted:

1. Stevedores are included within the workmen's compensation act of the state of Washington if the 1922 amendment is constitutional and (2) does not unlawfully delegate powers to the several states, as the operation of a compulsory workmen's compensation act on persons engaged on navigable water does not hinder or materially prejudice the uniformity of admiralty matters to any greater extent than a so-called elective compensation act would do.

It is therefore respectfully submitted that the decision of the supreme court of the state of Washington should be reversed.

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